Public Prosecutor v Iskandar bin Mohamad Yusof

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–36 OF 2001
SURIYADI J
27 APRIL 2006

Criminal Procedure — Defence — Witnesses — Existence of a third party whom drugs belong to — Whether there ought to be witnesses to support the defence's assertion

Evidence — Burden of proof — Criminal case — Prosecution misplaced crucial evidence — Two probabilities — Whether the conclusion that favours the accused must be taken up by the court —

The accused person had been charged under s 39B (1) (a) of the Dangerous Drugs Act 1952 for the offence of trafficking cannabis. The prosecution's case was that, on 5 June 1999 a police party had positioned themselves in their respective cars at the place of ambush. The accused person attempted to speed off but failed as a member of the police party had managed to grab the rear of the motorcycle. They found nothing incriminating on him but found a bag, in which was found four packages suspected of containing drugs, near the motorcycle. The police found no one else at the scene. At the scene the police party seized the abovementioned bag, a white helmet and the suspected drugs. In the course of the police investigation the chemist (SP1) confirmed that the seized suspected drugs were cannabis. In time pictures of the seized items were taken by the police. Later for some reason or other the police lost the bag, the white helmet, the pictures and the negatives, whilst in the custody of the police. In the course of the defence stage, the accused person alleged that the bag which contained the drugs was owned by one Hassan, a friend who had hitched a ride from him that night. This person had managed to make good his escape during the confusion, leaving the accused person eventually stranded and being held responsible for the abandoned incriminating item.

Held:

(1) The want of witnesses to support the defence's assertion should not be held against him, as no legal requirement exist which demands their obligatory production, to ensure acceptance of his defence. The prosecution had alleged that this so-called Hassan was an afterthought, and such a suggestion should not be given much weight, let alone such a name was not even mentioned by the accused person in the cautioned statement. Quite rightly counsel for the accused person had clarified that no evidence was adduced by the prosecution to indicate that a cautioned statement was ever taken by the police. Even though the allusive name of Hassan was supplied by the accused at an

early stage of the prosecution, and despite knowing that any investigation was a continuing process, none was conducted by the police to eliminate that defence. In a word the accused person's defence was already in its surreal form at the earliest of stages though not concretized by any sworn evidence (see para 13).

(2) Even though the accused had failed to adduce cogent evidence to establish his existence, in the like of witnesses coming forward to support his story, yet in the light of shortcomings in the prosecution's story especially the misplaced white helmet, the bag which housed the drugs, the lost pictures and negatives, what with his position now strengthened by his unimpeached sworn statement the assertion of Hassan's probable existence could not be discounted (see para 14).

(3) If at least two probabilities could be derived from a set of facts, one favouring the accused person and the other not, the conclusion that favours the accused must be taken up by the court to be exploited in his favour (see para 16).

[Bahasa Malaysia summary

Tertuduh telah didakwa di bawah s 39B (1) (a) Akta Dadah Berbahaya 1952 untuk kesalahan mengedar kanabis. Kes pendakwa raya ialah pada 5 Jun 1999 di mana sekumpulan polis telah menempatkan diri mereka di dalam kereta masing-masing di tempat serang hendap. Tertuduh telah cuba melarikan diri tetapi gagal oleh kerana seorang daripada sekumpulan polis telah berjaya menyambar belakang motosikal tertuduh. Mereka tidak menjumpai sebarang benda yang dapat membabitkan dirinya, tetapi menjumpai satu beg, di mana empat bungkusan yang disyaki mengandungi dadah, berdekatan motosikal. Polis tidak menjumpai orang lain di kejadian tersebut. Di kejadian tersebut pihak polis merampas beg, satu topi keledar putih dan dadah yang disyaki. Dalam menjalankan penyiasatan polis, ahli kimia (SP1) mengenalpasti bahawa rampasan beg yang disyaki dadah adalah kanabis. Dalam pada itu gambar-gambar telah di ambil berhubungan dengan rampasan barangan oleh polis. Seterusnya di atas sebab lain, polis telah kehilangan beg, topi keledar putih dan gambar-gambar serta negatif-negatif, sementara di bawah jagaan polis. Dalam peringkat pembelaan, tertuduh menyatakan bahawa beg yang mengandungi dadah dimiliki oleh satu Hassan, seorang kawan yang telah menumpang di motosikalnya pada malam tersebut. Orang ini telah berjaya melarikan diri ketika huru-hara, meninggalkan tertuduh dengan barangan yang membabitkan dirinya itu.

Diputuskan:

(1) Ketiadaannya saksi-saksi untuk menyokong pengataan pembelaan tidak patut diputuskan terhadapnya, oleh kerana tidak dapat keperluan undang-undang yang menuntut kewajipan pengemukaan untuk memastikan penerimaan pembelaan. Pihak pendakwa raya telah mengatakan bahawa orang yang kononnya bernama Hassan adalah difikirkan kemudian, dan bahawa cadangan sebegini tidak sepatutnya diberikan pertimbangan yang banyak, apatah lagi namanya langsung tidak dinyatakan oleh tertuduh di pernyataan beramaran.

Adalah betul peguambela tertuduh telah memberikan penjelasan bahawa tiada keterangan dikemukakan oleh pendakwa raya untuk menunjukkan pernyataan beramaran pernah diambil oleh polis. Walaupun nama alusi Hassan dibekalkan oleh tertuduh pada permulaan awal pendakwaan, dan walaupun tahu sebarang penyiasatan adalah proses yang berterusan, tiada yang telah diambil oleh polis untuk menyingkirkan pembelaan tersebut. Dalam kata yang lain, pembelaan tertuduh adalah di luar realiti pada peringkat awal walaupun tidak dikukuhkan dengan sebarang bukti bersumpah (lihat perenggan 13).

(2) Walaupun tertuduh gagal mengemukakan keterangan yang meyakinkan untuk membuktikan kewujudannya, dalam saksi-saksi yang menyokong ceritanya, namun di dalam kekurangan-kekurangan cerita pendakwa raya terutama kehilangan topi keledar, beg yang mengandungi dadah dan gambar serta negatif-negatifnya, apa lagi dengan keadaannya yang dikukuhkan dengan keterangan bersumpahnya yang tidak dicabar bahawa Hassan berkemungkinannya wujud tidak boleh dikurangkan (lihat perenggan 14).

(3) Sekiranya terdapat dua kebarangkalian yang dapat berpunca daripada satu set fakta-fakta, satu memihak tertuduh dan yang lagi satu tidak, pencapaian yang memihak kepada tertuduh mesti diambil oleh mahkamah dan dieksploitasi bagi pihaknya (lihat peernggan 16).]

Notes

For cases on burden of proof in criminal cases, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 363–376.

For cases on witnesses, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1630–1638.

Cases referred to

Chan Peon Leon v PP [1956] MLJ 237 (refd)
Leow Nghee Lim v R [1956] MLJ 28 (refd)
Looi Kow Choi & Anor v PP [2003] 1 CLJ 734 (refd)
Mohamed Hasan v PP [1998] 2 MLJ 273 (refd)
Mohamed Yazri bin Minhat v PP [2003] 2 MLJ 241 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
PP v Lam San [1991] 3 MLJ 426 (refd)
PP v Ooi Teng Chian [2006] 1 MLJ 213 (refd)
PP v Tan Tatt Eek and other appeals [2005] 2 MLJ 685 (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162 (refd)

Legislation referred to

Criminal Procedure Code s 180
Dangerous Drugs Act 1952 ss 2, 37(da)(vi), 39B(1)(a)

Salim bin Soib (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Rajpal Singh (Jasbeer Nur Hakimah & Rajpal) for the accused.

Suriyadi J:

[1] The accused person had been charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 for the offence of trafficking 3,132.5g of cannabis before me. The offence had been committed on 5 June 1999 at about 11.30pm at Jalan Satu, Tainan Greenwood, Daerah Gombak, Selangor Darul Ehsan. To succeed the prosecution had to establish, inter alia, that the drugs were possessed by the accused person, they were dangerous drugs as" scheduled under the Dangerous Drugs Act 1952, the weight tallied as in the charge, and he had trafficked them.

[2] The charge reads:

> Bahawa kamu pada 5 Jun 1999, jam lebih kurang 11.30 malam di Jalan Satu, Taman Greenwood di dalam Daerah Gombak dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya, iaitu seberat 3,132.5g Canabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah s 39B (2) Akta yang sama.

[3] The prosecution's case was that, on 5 June 1999, SP5 at about 10 p.m. had held a meeting with her officers in preparation of a drug bust at Jalan Satu, Taman Greenwood, Gombak, Selangor ('place of ambush'). By 11 p.m. the police party had positioned themselves in their respective cars at the place of ambush d thereafter waited for the quarry. At about 11.30pm, they saw a motorcycle bearing registration number WEC 3110 approaching. It was ridden by a male person later identified as the accused person. He had stopped at the ambush spot, whereupon SP5 forthwith alighted out of her car and simultaneously uttered 'police'. She had also flashed her authority card at about the same time. At that instance, the accused person attempted to speed off but failed as a member of the police party had managed to grab the rear of the motorcycle. A struggle then ensued culminating with the accused person being arrested. They found nothing incriminating on him but found a bag, in which was found four packages suspected of containing drugs, near the motorcycle. The police found no one else at the scene. At the scene, the police party seized the abovementioned bag, a white helmet and the suspected drugs.

[4] In the course of the police investigation, the chemist (SP1) confirmed that the seized suspected drugs were cannabis weighing 3,132.5g. In time, pictures of the seized items were taken by the police. Later for some reason or other, the police lost the bag, the white helmet, the pictures and the negatives, whilst in the custody of the police, much to the chagrin of the accused person.

[5] The prosecution had called eight witnesses to prove its case, and at the end of the prosecution case, having been satisfied that a prima facie case had been established, I thereupon called the defence. What prima facie means I can do no better than quote the following from *Looi Kow Choi & Anor v Public Prosecutor* [2003] 1 CLJ 734:

> The correct test to be applied in determining whether a prima facie case had been made out under s 180 of the Criminal Procedure Code [and this would apply to a trial under s 173

> of the Code] was that as encapsulated in the judgement of Hashim Yeop Sani FJ (as he then was) in *Dato Mokhtar bin Hashim Anor v Public Prosecutor*. Therefore, a judge sitting alone under s 180 of the CPC must subject the prosecution evidence to maximum evaluation and to ask himself the question 'If I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case'. If the answer was negative, then no prima facie case had made out and the accused would be entitled to an acquittal. Subjecting the evidence of the prosecution to maximum evaluation to determine if the defence was to be called did not mean that the prosecution had to prove its case beyond a reasonable doubt at this intermediate stage.

[6] I had called the defence as, amongst others, I was satisfied that the accused person had actual possession of the drugs at the time of the commission of the offence (*Leow Nghee Lim v R* [1956] MLJ 28; *Chan Peon Leon v PP* [1956] MLJ 237). I was satisfied that he could deal with the drugs to the exclusion of others, and from the surrounding circumstances and inferences, I was convinced that he knew the nature of the drugs in that they were cannabis. The nature of drugs being cannabis was confirmed by the chemist department (SP1). Indeed, I was satisfied with the integrity of SP1, and as I was only interested in the elementary nature and identity of the substance, I had accepted his opinion on its face value. I found no evidence in rebuttal by another expert to contradict him or even conclude that his opinion was inherently incredible (*Munusomy v Public Prosecutor* [1987] 1 MLJ 492; *PP v Lam San* [1991] 3 MLJ 426).

[7] As regards the meaning of trafficking s 2 of the Dangerous Drugs Act 1952 reads:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

[8] Some of the unusual nature of the acts of trafficking could be resolved by the remarks of Hashim Yeop A Sani CJ (Malaya) in *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162 which reads:

> True, the definition in the Act sounds artificial and not according to the ordinary meaning of the word 'traficking' which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister] implication. See also the *Shorter Oxford English Dictionary*. *The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping.* It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v Public Prosecutor*.

[9] Factually he was riding a motorcycle, and on it had ferried the offending item. With luck being in short supply his ride was short-lived. Being caught whilst knowingly transporting the drugs en route to some destination, but; prevented midway or even having reached his destination when arrested by the police, at the

place of ambush, still qualifies as trafficking (*Mohamed Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241). I had no problems with the prosecution adverting to s 37(da)(vi) of the Dangerous Drugs Act 1952 as the problematic issue of double presumption did not exist here *(Mohamed Hasan v PP* [1998] 2 MLJ 273). That being so as the drugs were more than 200g the presumption was applicable. Returning to that maximum evaluation, if the accused person had remained silent, I would not have hesitated to convict him on the totality of the evidence.

[10] As said above when I called the defence I was satisfied that a prima facie case had successfully been established by the prosecution. Factually and legally the prosecution had satisfied all the ingredients and requirements of s 180 of the Criminal Procedure Code. Before arriving at that conclusion as required by the latter section, and as stated earlier, a maximum evaluation of the evidence was conducted by me. Needless to say that evaluation was totally one sided, in that it was substantially the evidence adduced by the prosecution, though peppered by the accused person's suggestions and answers elicited from witnesses in the course of the cross examination. Naturally, at that stage, no sworn testimony of the accused person was made available that could prematurely punch holes in the prosecution's story. Naturally too, whatever was suggested by the accused person that could be helpful to him inevitably would receive unhelpful answers. With such a scenario, the prosecution literally sauntered into the defence stage.

[11] At the defence stage, a different scenario expressed itself. The prosecution's story had to be re-evaluated maximum-like, but this time padded by the additional defence's version, which was given under oath. At the end of the accused person's case, unless the prosecution succeeded at convincing me beyond reasonable doubt, he must be acquitted. All the latter needed to do was to weaken the prosecution's case on a balance of probability.

[12] In the course of the defence stage, the accused person here had alleged that the bag which contained the drugs was owned by one Hassan, a friend who had hitched a ride from him that night. This person had managed to make good his escape during the confusion, leaving the accused person eventually stranded and being held responsible for the abandoned incriminating item. With the testimony of the accused person given under oath, his evidence thus merit serious consideration let alone at no stage of the hearing was he impeached. The pertinent question required to be resolved thus was, was it possible that the mysterious Hassan did probably exist, and not a mere scapegoat of a name alluded to by him as a passport to escape the charge? At this stage of the defence there was no legal demand that he must factually prove Hassan did exist. All he needed to do was to merely persuade the presiding judge of that probability. If he succeeded, then on a balance of probability those drugs could have been Hassan's, thus inexorably exonerating him.

[13] So, was there a probability that Hassan did exist? Not unexpectedly no witnesses came forward to substantiate his defence. And of course only a suicidal Hassan would dare admit to the ownership of the drugs or for that matter agreeing to all the allegations of the accused person. The want of witnesses to support the defence's assertion should not be held against him, as no legal requirement exist

which demands their obligatory production, to ensure acceptance of his defence. The prosecution had alleged that this so-called Hassan was an afterthought, and such a suggestion should not be given much weight, let alone such a name was not even mentioned by the accused person in the cautioned statement. Quite rightly, counsel for the accused person had clarified that no evidence was adduced by the prosecution to indicate that a cautioned statement was ever taken by the police. I did remind the learned Deputy Public Prosecutor too that even though the allusive name of Hassan was supplied by the accused at an early stage of the prosecution, and despite knowing that any investigation was a continuing process, none was conducted by the police to eliminate that defence. In a word, the accused person' defence was already in its surreal form at the earliest of stages though not concretized by any sworn evidence.

[14] So, did the accused person succeed in establishing the probability of Hassan's existence on a balance of probability at the end of the defence stage? Even though the accused had failed to adduce cogent evidence to establish his existence, in the like of witnesses coming forward to support his story, yet in the light of shortcomings in the prosecution's story especially the misplaced white helmet, the bag which housed the drugs, the lost pictures and negatives, what with his position now strengthened by his unimpeached sworn statement the assertion of Hassan's probable existence could not be discounted. At the stage before calling the defence, the said misplaced items did not cause any negative effect on the prosecution's case as explanations were supplied, let alone no rebuttal evidence was adduced to suggest sinister disposal of them.

[15] At the defence stage, in the light of the accused person's sworn testimony pertaining to Hassan, the misplaced items suddenly assumed a more important role. It became necessary that I retrace my steps and give a second appraisal of the lost items, as I could not detract from the fact that had those misplaced items not been lost, I could have made certain favourable findings beneficial to the accused person. It must be borne in mind that the prosecution's witnesses did not have exactitude in their mind when testifying regarding the bag's size that contained the drugs. Every prosecution's witness had certain specification of its size. Naturally, if it were small, then it could be placed on the motorcycle's basket without much difficulty, as opposed to its improbability if it exceeded the size of the basket. If it were too large a need arises for someone to hold it whilst the motorcycle was being ridden by the accused person. That someone could have been Hassan. With there being two possibilities, with one favouring the accused person, the loss of the bag certainly went against the vested interest of the accused person. Or to put it the other way around if the bag were not lost that piece of evidence could have been favorable to the defence's interest. In criminal law it is quite trite that if two conflicting scenarios exist, the one that favours the accused person must be favoured by the court.

[16] I now touch on the lost helmet. The prosecution had merely established that a white helmet was recovered at the scene of the ambush. Regretfully, by an oversight as admitted by the prosecution, it never established that it was taken from the accused person, and hence failed to have proved positively that it was his. Whose helmet was it then? If it was not his then it must have been taken from some other person perhaps Hassan. It could be speculated that If the helmet were in court and the accused had tried it on it could perhaps fit him perfectly. From that point of view that

loss was no loss to him. On the other hand, it could be possible that it would not fit him implying that it was the helmet of another person. Again, could it have been Hassan's? To reiterate the above legal principle, if at least two probabilities could be derived from a set of facts, one favouring the accused person and the other not, the conclusion that favours the accused must be taken up by the court to be exploited in his favour. As in the case of the bag, the loss of that helmet unfortunately must be to the disadvantage of the accused person, with its availability on the other hand favouring him.

[17] At the prosecution's stage, it was its duty to establish that the seized helmet was the one worn by the accused person at the material date. As stated earlier, it was admitted by the prosecution that an oversight had occurred as it had failed to lead evidence to establish that it was worn by the accused that night. Sadly for the prosecution the law does not take too kindly to such mistakes. At the defence stage, the accused person had said that at that material might he was using a blue helmet. With the failure of the prosecution to establish that the lost white helmet was the accused person's helmet I have to accept the latter's evidence that he had donned on a blue helmet that night. That being so the lost white helmet was someone else's. Again was it Hassan's?

[18] With the issues of the loss of the bag and the helmet out of the way, I now divert my attention to the lost pictures. I could not denigrate the importance of the neutral pictures, as a scrutiny of them would perhaps help establish the size of the bag, and perhaps even supply the court with an impression of the size of the helmet. In a word, the loss of the pictures was an irreplaceable loss to the accused person. To make matters worse, and rather conveniently, even the negatives were not in sight!

[19] I have avoided positively asserting that the loss of the above items was pursuant to some deliberate and sinister act by someone, as even the accused person at the stage of the defence story had failed to prove that probability. Suffice if I merely focus my prognosis on the loss suffered by the accused person as a consequence of their disappearance and there from blaming nonchalance for their disappearance. All the explanations however satisfactory at the prosecution's stage but shaken by the accused person's sworn statement, pales in comparison to the loss suffered by the accused person, as a consequence of the losses of those items. To sum it up, if they had been made available for my perusal, doubts could have been cast over the story of the prosecution that the impugned drugs found in the bag were his. In brief it was probable that Hassan existed and that the drugs were in all probability his.

[20] Even though the above conclusions was sufficient to warrant an acquittal, for completeness, I would like to touch on the mandatory requirement of the accused person knowing the nature of the drugs in his physical possession, even if Hassan did not exist. This requirement is mandatory and must be established by the prosecution enroute to ensure his conviction. The prosecution here had resorted to direct evidence to establish this ingredient. As in the situation of the mysterious disappearance of the exhibits in the hands of the police, the implication of which was that their disappearance did no harm to the prosecution's case when the defence was called, likewise it must also be implied that I was convinced of the accused person

knowing the nature of the drugs in his possession. What now is the status of knowledge at the end of the defendant's case?

[21] If the bag and the drugs were probably owned by Hassan (unless association implies some culpability without more), or even if Hassan did not exist, it takes more than the availability of inferences to persuade a court to conclude that the accused person knew the nature of the drugs. If it takes all kinds of tests on the part of the chemist department, and by experts at that, to conclude that the seized items were cannabis it will take more than dubious inferences to convince me that the accused person knew the offending items were cannabis. It must be understood that the prosecution had at the outset indicated that it was resorting to direct evidence in its attempt to establish possession and knowledge. Regretfully in this case, as there was no confession of that knowledge, the only evidential source was some rather skimpy inference.

[22] The prosecution had kept on harping that the act of upping the throttle when the police officers came out of the shadows, and then struggling to be free when pinned down by them, was sufficient evidence to prove that he knew the nature of the drugs. With every respect to the prosecution, such a submission was very weak at best. It must be understood that the relevant place was a very badly lighted area with the time being 11.30pm. It would take an extremely brave man or foolish person to want to confront three to four persons in civilian clothes, who have suddenly materialized from the dark corners of the ambush area, merely to prove a point. Any reasonable person, man or woman, would frantically scoot off as quickly as possible, and shed off the pursuers before any harm befalls him. Fear should not be discounted from the mind of the accused person. The attempt to escape in the circumstances of the case thus should not be taken against him.

[23] With the engine running, and a well padded helmet covering his ears, any remarks coming from a lady officer would sound muffled and unintelligible, perhaps even intimidating. With his motorcycle suddenly being grabbed from the rear by one of those hazy figures, a pervasive fear would surely envelope him, lending credence to the assertion that his vain struggle caused him to tumble and in the melee suffering some injury. With that set of facts adduced, and the blurry incident taking place in a matter of seconds, I was supposed to accept the suggestion as ventilated by the prosecution that he knew the nature of the drugs.

[24] With his frantic behaviour and conduct in such a backdrop having been satisfactorily explained away by his sworn testimony, there was thus no further evidence left upon which inferences could be drawn by the court to establish knowledge. With none left, not a shred of direct evidence was left for the court to consider, upon which to give effect to the prosecution's ventilation. However suspicious the behaviour of the accused person was, I was of the view that such set of facts was not sufficient. In fact it was my finding that he could not have known that the drugs were cannabis (*PP v Ooi Teng Chian* [2006] 1 MLJ 213; *PP v Tan Tatt Eek and other appeals* [2005] 2 MLJ 685).

[25] Based on those two grounds, of the probability of the existence of Hassan, and him as the owner of the drugs, and the failure of the prosecution to establish knowledge of the nature of the drugs by the accused person by direct evidence, I have no hesitation in concluding that the prosecution had failed to prove a case against the accused person beyond reasonable doubt. I therefore had acquitted him of the charge before me.

Order accordingly.

Reported by Sally Kee